UNIVERSITY OF WEST ALABAMA STATION 2 BUSINESS OFFICE LIVINGSTON, AL 35470,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 06-1084
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

The Revenue Department assessed the University of West Alabama ("Taxpayer") for State sales tax for May 2003 through February 2006. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on January 18, 2007. Michael Kendrick represented the Taxpayer. Assistant Counsel Keith Maddox represented the Department.

ISSUE

The Taxpayer is an institution of higher learning located in Livingston, Alabama. It operated a cafeteria on its campus in Livingston during the period in issue. It designated a part of the lump-sum amounts paid by its students for meals in the cafeteria as a fee used to pay the bond indebtedness incurred to construct the cafeteria building and to pay the utilities used in operating the facility. The issue is whether the fee is subject to sales tax as part of the taxable gross proceeds derived from the sale of the meals.

FACTS

The Taxpayer issued bonds in the late 1960's to finance the construction of a cafeteria building at the school. The State Board of Education also by resolution authorized the Taxpayer to charge a special dining hall fee sufficient to pay the bond indebtedness.

The Taxpayer contracted for Aramark Education Services, Inc. to provide meals in

the cafeteria during the period in issue. Three meal plans were available. The students paid the Taxpayer a lump-sum amount per semester for the selected meal plan. For example, for the fiscal year 2005 – 2006, the Taxpayer charged the students $670 for a 9 meal per week plan, $806 for a 14 meal plan, and $929 for a 19 meal plan.

The Taxpayer determined the amounts it charged for the meal plans based on the amount it paid Aramark for the food, plus 8 percent sales tax on that amount, plus the special dining hall fee. For example, the cost of the 19 meal plan for the 2005 – 2006 school year consisted of $659.59 paid to Aramark, 8 percent sales tax of $52.77 on that amount, and the special dining hall fee of $216.64, for a total of $929.

The Taxpayer has since the 1960's charged sales tax on only the amounts it paid to Aramark for the meals, but not on the special dining hall fee that was included in the price of the meal plans. The Taxpayer claims that in prior audits the Department never contended that the dining hall fee was taxable. The Department audited the Taxpayer for the period in issue and determined that the entire amount charged by the Taxpayer ($929 in the above example), including the fee, was subject to sales tax.[1] The Taxpayer appealed.

ANALYSIS

The Taxpayer's representative articulately argues that the amounts included in the meal prices that are used to pay the bond indebtedness and utilities are not derived from the sale of the meals, and thus are not part of taxable "gross proceeds of sales," as defined at Code of Ala. 1975, §40-23-1(a)(6). "Clearly, the (amount charged for bond indebtedness and utilities) is not accruing from the sale of tangible personal property in that it is related to

[1] The Department also assessed tax on other items that are not disputed by the Taxpayer.

the bond issue for the construction of the cafeteria and for the operation of the cafeteria as opposed to the sale of meals. Since the (amount) is not derived from or part of the sale of meals, it is not part of 'gross proceeds of sales' subject to sales tax pursuant to §40-23-1, et seq., Ala. Code 1975." Taxpayer's appeal letter at 1. I disagree.

Section 40-23-1(a)(6) defines "gross proceeds of sales" for sale tax purposes to include "[t]he value proceeding or accruing from the sale of tangible personal property, . . . without any deduction on account of the cost of the property sold, the cost of materials used, labor or service cost, interest paid, . . . or any other expenses whatsoever, ..." The above definition is broad and all-inclusive. When a purchaser buys tangible personal property from a retailer in Alabama, the entire amount paid by the purchaser for the goods is subject to sales tax. It is irrelevant what costs the retailer included or considered in determining the sale price, or how the retailer subsequently used the sale proceeds.

Applying the above rationale in this case, the entire lump-sum amounts charged by the Taxpayer for the meals sold in the cafeteria were taxable as gross receipts derived from the sale of the meals. The fact that a portion of the proceeds, i.e., the special dining hall fee, was designated to pay the bond indebtedness and the utilities in the cafeteria is irrelevant. The indebtedness and utilities were a cost incurred by the Taxpayer in selling the meals to the students. As stated, sales tax is due on the entire amount received by a retailer for property sold at retail, without deduction for any costs or expenses incurred by the retailer in providing or selling the property. Section 40-23-1(a)(6).

An analogous situation would be a large retailer that borrowed money, or issued bonds, to finance a new retail outlet. The retailer could not designate a portion of the price it charged for its goods at the outlet as a fee to be used to repay the borrowed funds or

bond indebtedness (or utilities), and then not charge and collect sales tax on that portion of the price. Rather, as in this case, the retailer's cost of the borrowed funds or bond indebtedness would be an underlying expense or cost of doing business, and thus not deductible from taxable gross receipts for sales tax purposes. The fact that the Taxpayer is a State institution of higher learning is also irrelevant because retail sales by the State, and specifically institutions of higher learning in the State, are subject to sales tax. Code of Ala. 1975, §40-23-2(1).

The Taxpayer's representative cites *State, Dept. of Revenue v. Cellular Pro Corp.*, S. 94-303 (Admin. Law Div. 1/3/95), in support of its position. Cellular Pro sold cellular telephones at retail. It also solicited cellular telephone service on behalf of an unrelated provider. It received a commission from the service provider for each service activation. Cellular Pro collected sales tax when it sold a telephone to a customer. The issue was whether the commissions were also subject to sales tax. The Administrative Law Division held that the commissions were not taxable because they were not contingent on or derived from the sale of the telephones.

> The commissions do not proceed or accrue from the sale of cellular telephones by the Taxpayer. Rather, the commissions are paid by Alltel solely for each activation of cellular telephone service solicited by the Taxpayer. The commissions are based on the cost of the Alltel service purchased by a customer, and are not contingent on or otherwise related to the sale of a cellular telephone by the Taxpayer. The Taxpayer receives the same commission from Alltel whether the customer purchases a telephone for $.99, $500.00, or not at all.
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> The Taxpayer is engaged in two distinct and separate businesses: (1) the sale of cellular telephone equipment, and (2) the solicitation of cellular service on behalf of and as agent for Alltel. The commissions received from Alltel are received for soliciting activations, not for selling tangible personal property. The commissions clearly should not be included in taxable gross proceeds subject to sales tax.

Cellular Pro at 3, 4.

Cellular Pro can be distinguished because unlike the commissions in *Cellular Pro*, which were not derived from the sale of tangible property, the lump-sum amounts received by the Taxpayer in this case, including the dining hall fees that were included in the lump-sum amounts, were derived from the sale of the meals. The taxpayer in *Cellular Pro* was engaged in two separate and distinct activities. The Taxpayer in this case is engaged in a single retail activity, i.e., the sale of meals to its students. The total amount received by the Taxpayer for the meals was thus subject to sales tax.

Finally, the Taxpayer argues that the Department had not taxed the dining hall fee in prior audits. That is irrelevant, however, to the legal issue of whether the fees are subject to sales tax. The Department cannot be estopped from collecting a tax that is legally due based on erroneous information provided by the Department. *City of Mobile v. Sumrall*, 727 So.2d 118, 121 (Ala. Civ. App. 1999). Consequently, the fact that the Department had erroneously not taxed the dining hall fee in prior audits is irrelevant.

The final assessment is affirmed. Judgment is entered against the Taxpayer for $27,901.57. Additional interest is also due from the date the final assessment was entered, October 10, 2006.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered March 22, 2007.

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BILL THOMPSON
Chief Administrative Law Judge

bt:dr
cc: Margaret Johnson McNeill, Esq.

Michael G. Kendrick, Esq.
Myra Houser
Joe Cowen